Supreme Court, U.S.
FILED
031062 NOV 12 2003
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OBED NORMAN,

Petitioner PRO SE,

v.

STATE OF WASHINGTON and
WASHINGTON STATE UNIVERSITY,

Respondents.

ON PETITION FOR WRIT OF MANDATE TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDATE

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QUESTIONS PRESENTED FOR REVIEW

I. Where the Supreme Court and FRCP 26 have clearly established the intrinsic duty of trial courts to perform a *Daubert* gate-keeping validation of expert testimony, did the 9th Circuit appeals panel violate this petitioner's substantial rights by failing to consider petitioner's timely and preserved *Daubert* challenge to the unvalidated defense expert testimony as not only technically and methodologically suspect but as also judicially noticeable as untruthful as mandated by Fed. Rules of Evidence 201?

II. In the light of the Supreme Court's holding that employer falsity, pretext, and mendacity are crucial probative elements in Title VII discrimination cases, did the appeals panel's failure to take judicial notice of pervasive defense falsehoods as mandated by Federal Rules of Evidence (FRE) 201 so violate the petitioner's substantial and due process rights as to constitute a miscarriage of justice in this case and a substantial erosion of the rights of all Title VII plaintiffs if upheld or left undisturbed by the High Court?

III. Whether the panel's unlawful failure to obey a federal mandate and thereby condone pervasive defense perjury by affirming and awarding costs constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power as envisaged under Rule 10a of the Supreme Court Rules?

IV. Are serious questions of equal protection and double standards raised in the way 9th Circuit Judge O'scannlain and the other panelists apply the *Daubert* requirement for expert testimony validation in Title VII cases?

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The unpublished Memorandum Opinion and Orders of the Ninth Circuit Court of Appeals appears at App., infra 1a-5a. The panel issuing the decisions consisted of Circuit Judges Canby, O'Scannlain, and T. G. Nelson

JURISDICTION

On March 21, 2003, the Ninth Circuit Court of Appeals filed an unpublished Memorandum Opinion (*02-35377 Norman v. Washington State University and State of Washington*) affirming the district court's dismissal of petitioner's Title VII race discrimination and retaliation complaint (*C00-5774 FDB*). On **August 14, 2003**, the Ninth Circuit Court of Appeals filed an Order Denying the Petition for Rehearing, *en banc* Rehearing, and Sundry Motions. This petition seeks review of the aforesaid judgment and was timely filed with the Supreme Court on or before **November 12, 2003** and is properly before this court.

REGULATORY PROVISIONS INVOLVED

The regulations relevant to this case are the Federal Rules of Evidence 201, 702, 703, 403, 404 and Federal Rules of Civil Procedure 26. The pertinent verbatim citations from the rules and the relevant Committees Notes are set forth in the Appendix, *infra*, 11a-15a.

STATEMENT OF THE CASE

I. SUMMARY OF JUSTIFICATION FOR REVIEW AND GRANTING OF WRIT MANDAMUS

Petitioner seeks relief from the Ninth Circuit's ruling and presents the following grounds for why this case raises important questions of federal law worthy of this Court's review at this time.

a. Petitioner respectfully requests this Court to resolve a discrepancy within the 9th Circuit as the panel has in this case taken a position on *Daubert* that is in conflict with its own decisions as well as with other circuits and the

Supreme Court. In *Mukhtar(2003)* the 9th Circuit declined *en banc* reconsideration of Circuit Judge O'Scannlain's opinion vacating a jury verdict on the grounds that the trial court had not used the term '*reliability*' in ruling on the pretrial *Daubert* briefs. Eleven sitting judges took the unusual step of joining in a dissent from the denial of *en banc* reconsideration and also denouncing the *Mukhtar* decision as '*unfair, arbitrary, and contrary to precedent and the federal rules*'. In the case at bar the 9th Circuit has declined *en banc* reconsideration of a decision by a panel (that included Circuit Judge O'Scannlain) that has ignored a district court's neglect to obtain statements from the defense expert and to perform the mandatory *Daubert* validation of expert testimony. By upholding such contradictory and controversial rulings by the same judge, the 9th Circuit is clearly in disarray on the important issue of *Daubert* validations and the review of this court is required to ensure intra-circuit uniformity within the largest circuit in the country. In this case the panel did not even address the Daubert issue. This petition is not about a contested decision based on a properly stated and acknowledged legal principle. This petition is about the panel's total disregard for the important principle enshrined in *Daubert* and the relevant Federal Rules and this court's review is proper and warranted under Supreme Court Rule 10.

b. The panel upheld a jury verdict in the face of un-rebutted evidence that the defendants and their expert witness had surprised plaintiff and lied pervasively at trial.

c. The panel had acted in direct violation of the federal rules by refusing to take the mandatory judicial notice of adjudicative facts when requested by petitioner and provided with un-rebutted evidence from reliable sources put into the record by defendants.

d. The panel's unlawful failure to obey a federal mandate (Fed. R. Ev. 201d) and thereby condone pervasive defense perjury constitutes such a departure from the

accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power as envisaged under Rule 10a of the Supreme Court Rules.

e. This case present the specific problem of a state (Washington) that is in effect instituting a type of affirmative action where white candidates are credited with unearned qualifications at the expense of qualified black candidates. The equal treatment of different racial groups under the law is an important federal question and the particular permutation of that problem presented in this case is one which awaits resolution by this Court. Over the last three decades the U. S. Supreme Court has properly shown itself very solicitous of white petitioners who claimed that their superior qualifications have been overlooked in favor of lesser qualified blacks. In this case the Court has an opportunity to address the issue of the State of Washington's practice of untruthfully and fraudulently inflating the qualifications of white candidates at the expense of black candidates with superior qualifications.

f. Employers have both incentive and abundant opportunities to lie in order to advance their cases in court. Properly enforced, the wisdom of Fed. R. Ev. 201 and Fed. R. Civ. P. 60 is that these rules are powerful disincentives for such lying by litigants. By reviewing this case the court can provide guidance to courts and significantly minimize lying by litigants in court.

II. PROCEDURAL BASIS FOR APPLICATION:

With a trial date set for 3-4-02, Petitioner on 8-21-01 provided the district court with a timely and full disclosure statement signed by his expert Dr. Dale Baker as required. Defendants deposed Baker and filed a motion challenging Baker's written statement. This provided the court with an opportunity to fulfill its "special obligation" to determine the relevance and reliability of expert Baker's testimony. *(Kumho Tire, 526 U.S. at 147.) (See Daubert v. Merrell Dow*

Pharms., Inc., 509 U.S. 579, 589-593 (1993)). Defendants' motion to strike Baker's expert testimony was denied.

On the other hand the defendants failed to comply with a court order and Fed. R. Civ. P. 26a(2)(Band C) by not submitting a **report signed by their expert witness** Steve Olswang and containing his conclusions and the factual basis for his conclusions. In the absence of such a report, Petitioner was barred under the rules from deposing Olswang (see Fed. R. Civ. P. 26(b)(4)(A)). Petitioner was also unable to object to anything as the only pretrial disclosure made by defense counsel was that Olswang would state his opinion to the court and the rules expressly forbid lodging objections to an expert's opinion (see Fed. R. Ev. 704(a)). The court was thus deprived of the opportunity to perform its important *Daubert*'s 'gate-keeping' function with respect to the testimony of defense expert witness Olswang.

It should be emphasized that the procedural errors that necessitated this petition are entirely the responsibility of the defendants, the district court, and the appeal court. The district court issued an order requiring expert testimony disclosure and then failed to enforce its own order in the face of defense non-compliance. The defense then used its non-compliance to surprise at trial with multiple lies by its expert before the jury. When the lies were brought to the attention of the court, both the district and appeal courts ignored the defense lies and in clear breach of precedent and the Federal Rules, upheld a jury verdict emanating from a trial tainted by multiple defense falsehoods.

Petitioner had complied with all the relevant rules and acted with all due diligence in asserting his rights and lodging timely objections. Petitioner's objection to Olswang's testimony is on record and cannot be waived as Olswang's false testimony is confusing and misleading to the jury (see Fed. R. Ev. 403)

On the stand Olswang went beyond stating his opinion and in breach of Fed. R. Ev. 703 he stated facts

which were not admissible on the grounds that these facts were entirely untrue as can be readily, and indisputably determined by resort to documents whose veracity cannot reasonably be doubted (see below). Because of the element of surprise occasioned by defendants' failure to provide a timely and full disclosure on Olswang's testimony, Petitioner lodged an objection to Olswang's expert testimony at the earliest opportunity after trial in a Motion For Stay of Judgment Pending Appeal filed with the district court. A similar objection was also lodged in Petitioner's Response to Defendants' Memorandum of Costs filed with the district court prior to the appeal. Petitioner had thus adequately preserved the *Daubert* issue for appeal and this is nowhere disputed or even addressed in the panel's memorandum opinion.

On appeal to the 9th Circuit, Petitioner again raised the *Daubert* issue in both the opening and answer briefs. In addition to raising the *Daubert* issue, Petitioner also filed a Fed. R. Ev. 201 Motion for Judicial Notice regarding the false factual assertions of expert witness Steve Olswang. This petition is not challenging judicial abuse of discretion, as widespread as it has occurred in this case as exemplified by the panel's denial of Petitioner's Fed. R. Civ. P. 60 Motion for Release from Judgment on Account of Defense fraud, surprise, and misrepresentation. The evidence for that motion was the same as that presented for the judicial notice motion. Rule 60 allows for litigants to be held accountable for fraud and lying to the jury up to one year after the trial. It is also the contention of this Petitioner that his timely Rule 60 motion for release from judgment should have forced a sufficiency of the evidence review standard on appeal. A Rule 60 challenge to a verdict is no different from a Rule 50 or 59 challenge.

This petitioner is respectfully requesting the Supreme Court to issue a *Writ Mandamus* to compel the 9th Circuit appeals panel to take judicial notice of adjudicative facts as

mandated by Federal Rules of Evidence 201(d). These adjudicative facts were appropriately and timely brought to the panel's attention by the petitioner. Mandatory taking of judicial notice in this case means that the case must be reversed or at the very least remanded.

Taking mandatory judicial notice is not a moot exercise in the context of this case. The issue underlying the judicial notice is the testimony of an expert whose testimony was not validated by the district court as mandated by the rules and the express directive from the Supreme Court in *Daubert*. The untruthfulness of Olswang's testimony by itself rise to compel ***mandamus*** but the requirements of *Daubert* and the magnitude and extent of Olswong's lies together with the clear mandate for Fed. R. Ev. 201 judicial notice make the issuance of a ***writ mandamus*** necessary in order to preserve the integrity and reputation of the judicial process in general and prevent a miscarriage of justice in this particular case.

While an overburdened judiciary has an understandable interest in *res judicata*, that interest has to be secondary to the need to protect the integrity of judicial proceedings and avoid miscarriages of justice. The defendants in this case should not be rewarded with a $5,000 cost award to be paid by a petitioner who has already been the victim of pervasive defense lies in front of a jury.

Petitioner concedes that the Supreme Court will only grant a petition for a writ of mandamus if the petitioner has a clear and legal right to the performance of the act sought to be compelled and if failure to compel the action may result in a miscarriage of justice. *(Keidel v. Mehrer, 464 N.W.2d 815 (N.D. 1991).* This petition seeks to compel an act clearly and unequivocally mandated by Federal Rules of Evidence 201(d). Petitioner has met all the conditions needed to compel the taking of mandatory judicial notice under Fed. R. Ev. 201. The rule is clear that the court must take mandatory judicial notice and ***'shall'*** provide for appropriate

jury instructions when *'requested by a party and supplied with the necessary information'* about *'adjudicative facts'* 'not subject to reasonable dispute in that' they are *'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'* (Fed. R. Ev. 201d). This request for judicial action may *'be taken at any stage of the proceedings, whether in the trial court or on appeal'* (Fed. R. Ev. 201(f).

III. THE FACTUAL BASIS FOR THE APPLICATION:

A. THE FALSE AND INADMISSIBLE FACTS TO THE JURY BY DEFENSE EXPERT STEVEN OLSWANG

A central part of the defense case was to counter petitioner's claim that his qualifications for tenure was superior to those of white comparator Dr. Lynda Hatch who was not only awarded tenure but also elevated to a Distinguished Chair in Science Education.

In 2000 the State of Washington outlawed affirmative action on the grounds that unqualified blacks were given preferential treatment at the expense of qualified whites. In this case the state of Washington – in collaboration with Washington State University and the University of Washington- is defending its action of appointing an unqualified white professor Lynda Hatch to a position of Distinguished Professor of Science Education at the same time that they denied tenure to Petitioner Norman. That Lynda Hatch has qualifications inferior to that of Petitioner Norman is clearly stated in the expert opinion of Dr. Dale Baker, the editor of the leading international journal in Science Education- *The Journal of Research In Science Teaching. (*see App., infra *6a).* By their actions the Education faculty of WSU also showed that they regard Hatch's qualifications inferior to those of Norman. The Education faculty of WSU awarded Norman graduate faculty status in 1995 and denied graduate faculty status to Hatch in

2001. Not to be missed in all of this, however, is the capriciousness of the peer evaluation standards used by Washington State University as evident in their elevation of Hatch to a distinguished chair in 1999 and then denying her graduate faculty status in 2001. This amounts to awarding someone a doctorate in one year and a year later evaluating their qualifications as not adequate for a high school diploma. Graduate faculty status is routinely awarded to junior non-tenured faculty in their second year at the University. Hatch's distinction lies in being the only distinguished professor ever denied graduate faculty status by her peers.

It is only the State of Washington and the administrators of Washington State University and the University of Washington who hold that Hatch's qualifications are superior to those of Norman. In order to support this contention the State of Washington and these administrators have resorted to lying extensively about the qualifications of Norman and Hatch. Steve Olswang, the vice-Provost of the University of Washington and an employee of the State of Washington has taken the lead on this matter as will be amply demonstrated in this petition.

In support of his contention that Hatch's qualifications were superior to Petitioner Norman's, Olswang stated the following facts (see below) on the stand which were untrue as can readily be determined by resort to documents whose veracity cannot reasonably be questioned (see Fed. R. Ev. 201). As a matter of law these factual assertions are inadmissible for the following reasons:

a. These facts were not disclosed in writing 90 days before trial as required by Fed. R. Civ. P. 26(a)(2)(C).
b. These factual statements had not been cleared by the court for jury consumption as required under Fed. R. Ev. 703 and *Daubert*.
c. These factual misstatements were patently not helpful to the jury as required under Fed. R. Ev. 702. On the

face of it, demonstrable lies and misrepresentations cannot ever be said to be 'helpful' to a jury.

Olswang to the jury: *'She [Hatch] had six articles in 2002, and a couple books in '99.* (Trial Transcript: page 28 lines 11 to 13).

The facts: Every single assertion by Olswang here is untrue. Defendants are put to the proof of these false statements in their response. Even Hatch does not claim all these 'accomplishments' on her inflated vita. Nobody in academia writes six articles in the first three months of a year or even in an entire year. Least of all Lynda Hatch who has in fact never written a single refereed paper in a scholarly journal or written a single scholarly book. A search of all the academic databases (see App., *infra* 16a) shows that Lynda Hatch has published a total of 5 articles totaling 15 pages in non-refereed unranked journals. Norman's publication record of 72 pages in 6 articles in tier 1 peer reviewed scholarly journals is vastly superior to that of Hatch who defendants appointed Distinguished Professor of Science Education. The editor of the leading journal in Science Education has evaluated Hatch's scholarship as **'very poor'** (see App., infra 9a) and inferior to that of petitioner Norman. When asked at trial by defense counsel whether she regarded WSU's elevation of Hatch to a distinguished chair as a **'rip off'**, Dr. Baker answered in the affirmative. The characterization of a 'rip off' was aptly introduced by the defense and further confirmed by the extensive lies in Olswong's 'expert' testimony on the stand.

That the statements by Olswang are false can be readily determined by resort to Lynda Hatch's vita, which was entered into the record by defendants and shows no publication for the year 2002 and is dated March 1999. Additionally, the scholarly publication of academics are generally and reliably available on internet academic data bases. If doubts are raised about these databases, the appropriate place to ventilate and resolve such matters would

be during *Daubert* briefing on remand. In the meantime the 9th Circuit must be compelled to take the mandatory judicial notice that Lynda Hatch has published 5 or at the most 7 non-refereed articles totaling 15 pages and not the 14 articles that Olswang claimed she published in 96, 97 and 2000. In the light of the jury verdict it has to be assumed as a mater of law that the jury believed these surprise falsehoods by Olswang.

Defendants' lying in court was an unfair act perpetrated against both the jury and the petitioner. It was also profoundly disrespectful to the court. Given the deference courts and juries afford to universities and academic administrators, defendants' lying in court defies harmless error analysis and constitute a structural error. Structural errors are "*so intrinsically harmful as to require automatic reversal.*" *Neder v. United States, 527 U.S. 1, 7 (1999)*. The 9th Circuit has defined structural error as an error that "permeates '[t]he entire conduct of the trial from beginning to end,' or '*affect[s] the framework within which the trial proceeds.*' " *Rice v. Wood, 77 F.3d 1138, 1141 (9th Cir. 1996)* (citation omitted).

It would be a clear error and manifest miscarriage of justice to affirm a jury verdict based on such patent falsehoods and procedural errors at all levels. This particular issue and the documentation provided mandates Fed. R. Ev. 201 judicial notice, reversal or at the least remand for *Daubert* and jury instruction. In the context of a *Daubert* inquiry, Defendants must be put to the proof of Olswong statements by providing full citations of Hatch's published works. Dr. Dale Baker, the editor of the flagship journal in science education was unable to locate Hatch's publications. The defendants have the serious burden of proving that Lynda Hatch's vita is not fraudulent. The vast discrepancy between Hatch's vast 60 page vita and the internet databases that shows an output of about 15 pages of mediocre writing and non-academic books needs resolution in *Daubert*

proceedings as these issues were raised in undisclosed and un-validated expert testimony and are a vital part of the defense case. It is also important to point out that Dr. Baker accepted Dr. Hatch's vita in good faith and at face value. As a result Dr. Baker inadvertently credits Hatch with an NSF grant while Hatch has in fact NEVER been the recipient of an NSF grant as her vita seem to suggest.

Olswang to jury. *'If you know the field, you would know no one gets tenure at Vanderbilt, Harvard, Yale, Princeton, to some extent Columbia Teachers College'.*

This untruth by Olswong was told to make excuses for the fact that a Vanderbilt external reviewer had declined to recommend tenure for white comparator Slavit. All the named institutions do award tenure to deserving candidates. This is a well known fact in academic circles as well as in the legal context where all these institutions have at one time or another been sued for denying tenure to plaintiffs. It is a fact generally known in the jurisdiction.

. This particular issue and the documentation provided mandates Fed. R. Ev. 201 judicial notice, remand for *Daubert* and jury instruction. Olswang's dissembling was premeditated and covered all the bases. Not only did he falsely inflate Hatch's credentials in order to advance his employer's defense. He also effectively undermined petitioner Norman's case by deliberately and falsely diminishing Norman's accomplishments.

Olswang to the jury. *'You would also look on the scholarship side at presentations. He [Norman] had a few presentations, relatively few. He had nine, I think is my memory, presentations in the community and to school teachers.(Trial Transcript p. 15 lines 12 to 14).* The facts: Norman had taught one week per year in an elementary school for the past 6 years. (30 presentations). In the funded SETCREST project alone in 1995/6 Norman gave 12 all day presentations to teachers. This is only a fraction of the presentations to teachers. Evidence for this was contained in Norman's tenure dossier which was available to Olswong.

Olswong deliberately misrepresented Norman's record and lied to the jury on material points.

Olswang to the jury: *'In the grant area, he[Norman] had a number of grants, two primary ones, one which was a career development award, which is something that the National Science Foundation particularly gives in the field of science, particularly to minority faculty;* (*Trial Transcript* p. 14 lines 15 to 18) The proof of the material falsity of this statement by Olswong is the NSF overview statement that the Early Career Development grant is the *'most prestigious award'* awarded to '*those teacher-scholars ... most likely to become the academic leaders of the 21st century.'* (see App., *infra* 19a). It is totally false and intentionally misleading to assert to a jury that the Early Career award is a grant '*particularly to minority faculty*'. Olswang's expertise lay in his agenda of grossly distorting Norman and Hatch's credentials in a manner calculated to advance the defense case. This particular issue and the documentation provided mandates Fed. R. Ev. 201 judicial notice, remand for *Daubert* and jury instruction. It should be noted that Steve Olswang is a persuasive and experienced lawyer licensed in almost every state and not to have subjected his 'expert' testimony to *Daubert* validation opened the way for him to play hard and fast with the facts and mislead the jury. It should also be noted that defense counsel lied to the court when she stated on the record that a statement **by** Olswang had been put into the record on the same day he took the stand. The record contains no such statement by Olswang..

Further examples of evidence presented for judicial notice are now listed. This shows that it was not only expert Olswang who lied but also most of the defense witnesses. In fact the trial record shows that **all** the reasons advanced by defendants for the tenure denial were either false or undercut by evidence on the record that these reasons did not elicit the same adverse employment action against similarly'situated white employees.

B. FALSE STATEMENTS BY DEFENDANT DENGERINK

Defendant's theory of the case was to show that Norman had acted inappropriately with respect to his student assistant Bonnie Bentz-Hewlett.

A. In his deposition on October 17, 2001 CEO Dengerink knowingly made a false statement. Dengerink gave the following reason for why on 10-6-99 he had Bonnie Bentz called out of her class and then questioned her about being sexually harassed by Norman and why she was accompanying Norman on a project trip: *'..no paperwork had been processed to employ her on the grant'*. The official employment document (see App., *infra* 23a) signed by Dengerink himself and dated 10-1-99 shows that Bentz was an employee on the grant by 10-6-99. Additional evidence that Dengerink lied is provided by the travel agent itinerary (see App., *infra* 24a), which proves that tickets for the travel had been issued on 10-1-99 and the travel had been appropriately authorized by 10-1-99. Dengerink's sworn statement that he *'was being asked to authorize the travel'* on 10-6-99 was a material and therefore perjurious lie.

B. Dengerink also knowingly lied when he stated under oath that Bonnie Bentz was the only one of Petitioner's supervisees whose salary was raised to $15 per hour.

The following is an verbatim exchange between Norman's counsel and Dengerink from the official trial transcript 1:

> Q. Let me tighten it up. Do you know how many people went from $8 to $15 an hour along with Bonnie Bentz?
>
> A. I am only aware of Bonnie Bentz having had the change in salary as I recall.
>
> Q. You don't know whether there were others who were given that increase as well?
>
> A. No.

Dengerink lied as proven by his own email dated

1-19-00 (see App., *infra* 25a) in which he resisted Norman's application to have Mike Spannik's salary raised to $15 per hour. Dengerink deliberately resisted the increase of Spannik's salary so that he could claim in court that Norman only paid Bentz at $15 per hour. In addition to Spannik, there were at least ten other observers who were all paid at $15 per hour as required by the budget and ultimately authorized by Dengerink. Dengrerink told this lie at a time that he knew it to be false.

Petitioner Norman presented evidence to the panel that defendant Dengerink lied when he stated under oath that student Bonnie Bentz-Hewlett had accompanied Norman on a trip at a time when she was not employed on Norman's grant project. This was a material lie and the evidence presented were official defense personnel and business records . These are documents 'whose accuracy cannot reasonably be questioned'(Fed. R. Ev. 201(b)).

Norman had thus met the Fed. R. Ev. 201 burden with regard to the timeliness, the nature of the fact asserted, as well as the nature of the evidence presented. The panel had no discretion in this matter and were mandated under the rules of evidence not only to take judicial notice but also to ensure that the jury would be instructed accordingly.

C. FALSE STATEMENTS BY DEFENSE WITNESS BONNIE BENTZ-HEWLETT (HEREINAFTER CALLED BBH)

In the 1999 investigation BBH testified repeatedly that she was never harassed by Norman. In addition to being interrogated during the University investigation and being deposed twice for this case, BBH has never once accused Norman of sexually harassing her. The investigation 'cleared' Norman of any wrongdoing as stated by Provost Battaille at trial. Despite the fact that Norman was cleared in a full investigation conducted by WSU in December 1999,

the State of Washington persisted in fabricating evidence that Norman had harassed BBH.

In October 2001, WSU and the State of Washington sent investigators to the home of BBH. In depositions BBH described the actions of these state operatives as 'persistent': After harassing BBH with these investigators, the Attorney General of the State of Washington prepared an affidavit containing falsehoods and presented it to BBH for her signature. This was a clear case of coercively suborning perjury. This affidavit is the only document in which BBH has stated that Norman had ever harassed her. Bonnie Bentz-Hewlett reversed the testimony she had given over a two year period. Bentz made the following false and libelous statement in the sworn affidavit dated 12-8-2001: '*Our personal relationship ended in late spring, early summer 2000. Beginning in April 2000, I attempted to end our relationship. Every time I attempted to break off our relationship, Obed Norman would pressure me and harass me with emails and telephone calls.*' (point 13 on affidavit).

Even after she was forced to sign this false declaration BBH once again reverted to telling the truth and in her videotaped deposition (taken on 2-28-02) she again denied under cross examination that Norman had ever harassed her or that there was any quid pro quo in their consensual relationship. The State of Washington used its resources and influence to coerce BBH into signing a false affidavit prepared by the AG of Washington. This affidavit falsely accused Norman of harassing her. In spite of BBH's testimony to the jury that Norman did not harass her, the State of Washington made the false accusation of harassment both in its opening and closing statements at trial. They did this despite the repeated and clear court instructions at trial that they should not accuse Petitioner of having harassed or threatened anyone. In clear violation of the court's instruction the state of Washington made this accusation in the full knowledge that it was untrue and also in the full knowledge that making such an accusation after a

WSU investigation 'cleared' Norman, was an egregious breach of the WSU Faculty Manual contract.

These false assertions made by BBH at the coercion of defendants are flatly contradicted by her own words in the following unedited email exchanges between Bentz and Plaintiff covering the period April 2000 to September 2001:

EXCHANGE 1: Contradicting Bentz's Declaration statement that Plaintiff send her harassing emails in April 2000:
Plaintiff to Bentz on 4-17-00:

> friday may 5 is opera . mozarts le nozze di figaro at psu. i have invite to
> pannini and wine reception prior to performance. reception from 6pm to 7:15
> pm. please rsvp asap to me to get tickets. need to know befire friday this week.

Bentz reply to Plaintiff on 4-17-00:
>sounds lovely-b

EXCHANGE 2: Bentz expressing disappointment that Plaintiff might relocate to California:
Bentz to Plaintiff on 11-12-00

>hi there,
>hey not sure I like the conversation about your going to CA or wherever to teach, whts with that? Also, I ADORE YOU!! for taking up with Tim's case, if that comes through, I totally will owe you. love you, b

EXCHANGE 3: An example of how Bentz sought out Plaintiff's companionship giving the lie to her assertion that she sought to distance herself from Plaintiff since December 1999:
Bentz to Plaintiff on 10-17-00:

Hi there sweetie,
I like opening this site and finding you there also. Hope thurs. will be a beautiful day out,
I need sunshine and poetry in my life now. Had

a hectic day today and yest. I tried to get out of meeting with Dr. Lamb but was not able to- I didn't feel up to being brilliant-ha, or anyhting close, but in any case, spoke with him about my research. love you, Bonnie

Bentz to Plaintiff on 12-5-00:

hi there sweeetie,
hey call me as soon as you get the chance- I had a rotten night last night -spent in the hospital, hwich sucked. Also, well anyway call me- l-b

EXCHANGE 4: The amicable break up exchange between Bentz and Plaintiff giving the lie to Defense counsel's statement to the jury that Bentz was terrified of Plaintiff:

Exchange on 9-30-01:

> Bonnie B <bibi_002000@yahoo.com> wrote:
> > thank you for your concern. so do I have this
> > conversation with you and Elvis or jsut you?
> > In any case, hope all goes well with depo., also I
> > ahve done alot of thinking and realize, as you
> had
> > noted, that it is time to have you understand
> where
> > I
> > am. I know now that I truly love this man in my
> life
> > and am very happy with him. I know that you
> > understand
> > and hope you will also wish me well, as I do you.
> > Take
> > care adn keep well,
> > b

--- Obed Norman <bibibi_99@yahoo.com> wrote:

> *i do wish you well. be sure to get in touch if wsu*
> *makes any trouble for you. o*

> Bonnie B <bibi_002000@yahoo.com> wrote:
>thank you, obed, I appreciate that,
>Bonnie

The original emails are part of the record on appeal. They were sent by Ms Bentz to Plaintiff over a one year period and prove conclusively – by her own words - that she lied in the affidavit the defendants coerced her into signing for the sole purpose of smearing petitioner with a false charge of harassment in order to advance their case at trial.

The relationship between Bentz and Plaintiff was a consensual and civilized relationship with no harassment, no coercion, and no quid pro quo as Bentz has repeatedly stated under oath and in these email exchanges. In order to justify their racially motivated tenure denial, Defendants had coerced and harassed Bentz into complicity with their smear campaign against Plaintiff.

It is important for the court to note that the use of students to fabricate false charges of harassment and rape against Black faculty is an established institutional practice at WSU. In 1999 Dr. Collin Beckels, a 35 year old Black professor, committed suicide when he realized that he had no chance of vindicating himself in front of an all-white Washington state jury facing a white female students who had been enlisted and coached by the WSU administration to lay false charges of rape and harassment against him. The malice and ruthless persistence with which the State of Washington and WSU administrators pursue their retaliation against black faculty is clearly evident here.

D. FALSE STATEMENT BY DEFENSE COUNSEL PARISSIEN, ASSISTANT ATTORNEY GENERAL, WASHINGTON STATE.

(To save costs, documents in the record supporting petitioner's assertions will be provided on response to the

court only if the defendants deny any of the assertions in their opposition brief):

The Defendants stated in their appeal response brief that their theory of the case was that Norman had a relationship with his student employee Bonnie Bentz-Hewlett (BBH) and the existence of this relationship justified the sexual harassment investigation launched against Norman by CEO Dengernk in October 99. The trial record also contains undisputed testimony by two white faculty members (Drs. Ankrum and Peck) that they also had relationships with students and that they were never investigated despite the fact that WSU administrators admitted at trial that they knew of their relationships. In order to overcome the testimony of these white faculty members the State of Washington fabricated the falsehood that there was a different policy in place for the white faculty members.

From the trial record it is unclear whether the State of Washington simply applies the same policy in different ways for blacks and whites or whether the policy simply does not apply to white faculty. What is undisputed from the record is that only Black faculty such as Petitioner Norman and Dr. Collin Beckels were investigated under this policy. Dr. Beckels was so traumatized by the investigation that he committed suicide while being investigated. Defendants refer to Dr. Beckels' investigation and his suicide in their brief to the 9th Circuit.

What is also undisputed is that the Assistant Attorney General of the State of Washington lied to the court when she stated in a brief dated 12-6-01 that the sexual harassment policies that were in effect in 1992 were different from those in effect in 1999. In their brief. Defendants stated that the WSU sexual harassment policy in 1992 was different and therefore different rules applied to a white professor Ankrum when she dated a student in her class. This was a deliberate lie as the same policy had been in place since 1987. In fact Defense counsel was making all these statements at a time

when she was facilitating the amorous relationship between Anthropology student Bonnie Bentz-Hewlett and her white faculty advisor Anthropology Professor Barry Hewlett. Defense counsel also deliberately concealed this information from the court although it was relevant to the court case.

The WSU Policy document entered into the record by WSU shows that the same policy was in effect from 1987 to 1999. Under the controlling cases of the 9th Circuit, conduct that is *"tantamount to bad faith"* is sanctionable. *Roadway Express, Inc. v. Piper 447 U.S. 752, 767 (1980).* It is the established position of the 9th Circuit that *'an attorney's reckless misstatements of law and fact, when coupled with an improper purpose are sanctionable under a court's inherent power." Fink. 239 F. 3d at 992, 994 (9th Circuit, 2002).* In a clear abuse of discretion and in clear violation of case law the panel refused to sanction the defense counsel for this act of deliberate lying to the court.

However, the panel's egregious abuse of discretion and disregard for case law is not being challenged in this petition. What is being challenged is the panel's repeated defiance of federal court rules that mandate them to take judicial notice in the circumstances. This nation did not countenance the actions of Governor Wallace when he tried to defy a federal order that granted black children admission to Alabama's schools. The Alabama Supreme Court acted against its own Chief Justice when he recently attempted to defy a federal court order to remove a religious symbol from a public space and this High Court appropriately left that action undisturbed. In the case at bar the United State Supreme Court has an opportunity to show that even Federal Appellate Judges are not above the law and may not defy federal mandates with impunity as this panel has clearly done both with regard to *Daubert* and with regard to the mandated Fed. R. Ev. 201 judicial notice. In *Reserve Mining Co. v. Lord, 529f.2d 181, 185, 186, 188 (8th Circuit, 1976)* the court stated: *'Our system of government is premised upon subservience to the rule of law. If a judge in the exercise of*

judicial power lose sight of these principles, the result is autocratic rule by lawless judicial actions'. This petitioner respectfully submits it is improper for a judge to disobey a clear mandate and the Supreme Court should compel compliance in this case to preserve the reputation of judicial proceedings.

E. FALSE STATEMENTS IN DEFENSE OFFICIAL DOCUMENTS

The document outlining the reasons for the tenure denial is riddled with falsehoods and misrepresentation as outlined in Norman's Appeal brief.

Reason 4 : *'Norman has only chaired six student committees since 1995'.* This 'reason' is a downright and deliberate lie. The materials Norman submitted listed the names and the dates of the 13 (thirteen) master's degree committees he had chaired. Slavit, a white comparator, had chaired only 12 committees despite the fact that Slavit's teaching load was only half that of Petitioner Norman's.

F. FALSE STATEMENTS BY DEFENDANT MITCHELL

Norman's request is for the court to take judicial note that the official tenure vote by the WSU Department of Teaching and Learning was to award tenure to Norman by a vote of 8 for tenure (including Chair Miller) and 7 against tenure.

Mitchell lied when she insisted under oath that Chair Miller did not and does not vote. While the Deans and Director do not vote and merely make recommendations, the policy guidelines entered into the record, are very clear that the Chair has a vote in addition to analyzing the ballots and faculty comments. Chair Miller voted yes and she confirmed that in deposition. Defendants persisted in this lie in order to make the point that the Departmental vote for tenure was tied at 7-7 when in fact the vote was 8-7 as indicated on the official WSU ballot (see App., *infra* 23a). If defendants insist

that Chair Miller did not vote they can obtain an affidavit from her in which she will have to contradict her sworn deposition that she did vote yes for tenure for Norman.

It is petitioner's contention that the evidence for the pervasive falsity of the defense case meets the evidentiary burden for inferring discrimination. Plaintiff has also presented 'other relevant evidence' of Defendants' discriminatory intent sufficient to 'compel' a finding of discrimination *(see Reeves v. Sanderson Plumbing Products, Inc., (530 U.S. 148, 149 S. Ct. 2097, 147 L. Ed. 2d 105 (2000))*. As was the case in *Costa v. Desert Palace (9th Circuit, 2002)* this is clearly a case where "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311-12 (1965) ("[W]here many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced.")*. To paraphrase mutatis mutandis: Where consensual faculty-student relationships are not sanctionable or prohibited under the WSU policy and this is the manner in which the WSU administration has applied and continues to apply the policy to white faculty members Peck, Ankrum, and Barry Hewlett, this court need not listen at all to WSU's patently false plea that it was merely enforcing its policy when it subjected black faculty members Norman and Beckels to vicious and fabricated sexual harassment and misconduct investigations which led to Beckels' suicide.

Many of the material lies of the Defendants and their witnesses took the general form of distorting the record of white comparators Hatch and Slavit in order to conceal their deficiencies and to distort the record of Appellant so that his superior accomplishments were minimized and/or totally unacknowledged. An example of this lying with a discriminatory intent can be seen in the Analysis and Recommendation that Chair Darcy Miller wrote in support

of the tenure application of white candidate David Slavit. Miller states falsely that Slavit is the Principal Investigator of a $412,000 Department of Education grant. Slavit himself only claims that he applied for the grant (his application proved unsuccessful) but Miller fraudulently credits him with the grant. WSU administrators not only lied on behalf of white candidates but these white candidates were also encouraged to fraudulently inflate their achievements on their vitas.

IV. LEGAL ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT MANDAMUS

A. PETITIONER HAS MET THE BURDEN FOR MANDATORY FED. R. EV. 201 TAKING OF JUDICIAL NOTICE

Petitioner Norman has in this case presented un-rebutted documentary evidence of substantive and material surprise defense perjury, fraud, and misrepresentation at trial. The Federal Rules of Civil Procedure (Rule 60) make it clear that surprise fraud and perjury can be challenged as long as one year after trial. In this case the petitioner challenged the surprise defense fraud and perjury in a timely appeal. Petitioner had no expectation that the State of Washington and Washington State University would engage in such whole scale distortion of the truth at trial. Furthermore the trial was held in Tacoma, Washington, and the Petitioner therefore did not have access to all his rebuttal documents, which were at his home in the San Francisco area.

Reversal of a jury verdict is only possible when the jury trial was tainted and compromised significantly. Petitioner's contention is that the jury trial was so compromised and tainted by the pervasive defense lies and fraud that this court should compel the mandatory taking of judicial notice and reversal of the jury verdict. In this case the expert (as well as the defendants) lied to the jury many

times on major material points. Such testimony clearly does not meet the *Daubert* standard and patently affect petitioner's substantial rights (Fed. R. Civ. P. 61). Therefore the panel should have properly reversed the jury verdict. (*Cf. United States v. Rahm*, 993 F.2d 1405, 1412-15 (9th Cir. 1993). The court should compel the panel to reverse the jury verdict, tainted as it was by so many lies.

B. ALLOWING DEFENSE MENDACITY TO GO UNNOTICED VIOLATES PLAINTIFF'S SUBSTANTIAL TITLE VII RIGHTS

In the light of the Supreme Court's holding that employer falsity, pretext, and mendacity are crucial probative elements in Title VII discrimination cases, it is this petitioner's contention that the appeals panel's failure to take mandatory judicial notice of pervasive defense perjury so violate the petitioner's substantial and due process rights as to constitute a miscarriage of justice in this case and a substantial erosion of the rights of all Title VII plaintiffs if the panel's decision is upheld or left undisturbed by the High Court. The Supreme Court of the United States has stated that as a general principle of evidence law, a party's dishonesty about material facts may be taken as affirmative evidence of guilt (Wright v. West, 505 U.S. 277, 296, 112 S.Ct. 2482, 120, L.Ed. 2d 225 (1992). Furthermore the Supreme Court has stated that in the specific context of Title VII race discrimination cases, the showing of defense 'mendacity' is deemed a sufficient basis from which to '*infer the ultimate fact of intentional discrimination*'. (St. Mary's Honor Center v. Hicks, 509 U.S. at 511, 113 S.Ct. 2742.). This panels' decision to condone the multiple instances of defense mendacity in this case thus not only defies the court rules but also flies in the face of the Supreme Court's holding on the probative value of defense mendacity in Title VII cases.

The issues in this case affect all Title VII plaintiffs. For that reason the Vancouver Branch of the NAACP, Dr.

Etta Hollins (former Chair of Teaching and Learning at WSU), and others will seek *amicus* status in the next phase of this case.

C. ALLOWING DEFENSE MENDACITY TO GO UNNOTICED CONSTITUTES MISCARRIAGE OF JUSTICE.

In arguing that failure to compel the action constitutes a miscarriage of justice, petitioner relies on a standard set by Judge O'scannlain who was on the panel in this case and who also wrote the opinion in another Title VII case *Mukhtar v. Cal.State Univ., Hayward*, 01-15565 slip op. (9th Circuit, Feb. 12, 2003).

In *Mukhtar* the lower court obtained statements by the experts and requested *Daubert* briefs prior to ruling that the written expert testimony was acceptable for jury consumption. The panel however ruled that the lower court judge had not explicitly stated on the record that it had determined the 'reliability' of the expert testimony and that this failure by the court prejudiced the defendants sufficiently to warrant vacating the jury verdict in which plaintiff *Mukhtar* had prevailed. The panel made this determination despite noting that *Mukhtar's* (*at 1978*) expert was well qualified and there was no question regarding the relevance and accuracy of his expert testimony. In vacating the $620,000 jury award to black Title VII plaintiff *Mukhtar*, Judge O'scannlain stated:

> *'We agree with the Tenth Circuit that "some . . . reliability determination must be apparent from the record" before we can uphold a district court's decision to admit expert testimony.'(Mukhtar at 2002)*

In the original *Daubert v Merrel Dow, 92-102 S. Ct. (1993)* Justice Blackman wrote the opinion for the court and stated:

> *'Faced with a proffer of expert scientific testimony,*

*then, the trial judge **must** determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue'*

D. FAILURE TO COMPEL WILL DEPRIVE PETITIONER OF EQUAL PROTECTION UNDER THE LAW.

In the case at bar the defendants disregarded the rule instruction as well as the district court order that they present a full written statement signed by their expert and containing his testimony. When the defense expert did testify, his testimony consisted almost entirely of material misstatements of fact as can be fully verified from documents in the record (see below). In total disregard for the standard set by panelist Judge O'Scannlain in Mukhtar, the Norman panel did not even consider Norman's *Daubert* argument as their memorandum opinion contains no mention of it.

In *Mukhtar* the failure of the court to state explicitly that it performed a Daubert validation was considered sufficient ground for vacating a jury verdict. It is clearly a miscarriage of justice and an application of a double standard when the panel affirms the jury verdict in the case at bar despite the fact that the district court did not do a *Daubert* validation. This double standard is further compounded by the fact that the panel in this case violated this petitioner's substantial rights by failing to consider petitioner's timely and preserved *Daubert* challenge to the defense expert's testimony as not only technically and methodologically suspect but as also as judicially noticeable as untruthful as mandated by Fed. Rules of Evidence 201.

It is certainly a miscarriage of justice to uphold a jury verdict based on pervasive and deliberate defense lies. If employers can lie with impunity in Title VII cases, the rights of all Title VII plaintiffs will be fatally eroded. The panel's

unlawful failure to obey the federal mandate in Fed. R. Ev. 201 and thereby condone pervasive defense perjury constitute such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power as envisaged under Rule 10 of the Supreme Court Rules.

In *Mukhtar (at 1977, 1983)* eleven (11) 9th Circuit judges (the numerical equivalent of an *en banc* court) joined in a dissenting opinion which leveled the following criticism at the *Mukhtar* opinion written by Circuit Judge O'Scannlain who is also a member of the *Norman* panel: *'One victim of racial discrimination in employment has now also become the victim of unfair treatment in the courts'*. With the decision in the case at bar Judge O'Scannlain and his fellow panelists have added yet another victim to the list of Title VII plaintiffs who received unfair treatment in court. The eleven dissenting judges (the numerical equivalent of a 9th Circuit en banc court) further characterized the *Mukhtar* opinion as *'arbitrary, unfair, and contrary to both precedent and the Federal Rules'*. The same can be said of the Norman panel's decision. The 'unfairness' in both Norman and *Mukhtar* manifests itself in the consistent undermining of Plaintiffs' race discrimination claims by Judge O'Scannlain and his fellow panelists.

The dissenting judges expressed concern over the appearance that *Daubert* was being inappropriately applied in a manner excessively prejudicial to a Plaintiff's interests. In *Norman* that view of an uneven and anti-Plaintiff prejudicial application is reinforced in that the Norman panel totally ignores Norman's *Daubert* argument. In both *Norman* and *Mukhtar* the effect is to undermine the interests of a black plaintiff in a Title VII race discrimination action. In *Mukhtar* the court applied the requirement for expert testimony validation with an inflexibility and rigidity that the Supreme Court explicitly discouraged in the original Daubert decision. This was the view of the dissenting judges as well as prominent legal scholars such as Harvard Law Professor

Charles Ogletree and others who weighed in as amici or otherwise participated in the public debate that the *Mukhtar* matter generated in the legal and civil rights communities. In sharp contrast, the Norman panel which includes Judge O'Scannlain has acted with total disregard for the need for expert testimony validation and therefore directly contrary to an important legal principle established by the Supreme Court in *Daubert* and its progeny. The panel and Judge O'Scannlain's position with regard to *Daubert* appears to be one of : 'Heads, plaintiff loses. Tails, defendant wins'.

In *Reserve Mining Co. (529f.2d 181, 185, 186, 188 (8th Circuit, 1976)* the 8th Circuit warned against judges who seem '*to have shed the robe of the judge and to have assumed the mantle of the advocate. The court then becomes lawyer, witness, and judge in the same proceeding, and abandons the greatest virtue of a fair and conscientious judge – impartiality...*'. Judicial advocacy becomes a legitimate concern when the same judge acts so uneven-handedly with regard to the same issue in order to advance the cause of defendants. In *Norman* the Motion for judicial notice and the Motion for Release from Judgment on Account of Fraud elicited no response from the defendants because they know they had lied in court as demonstrated with their own documents. Evidence law is that un-rebutted assertions are taken as true(see Fed. R. Ev. 301 and *Stringer v. Commissioner*,84 T.C. 693, 708 (1985), affd. without published opinion 789, F. 2d 917 (4th Cir. 1986) Holding that appeal issues not addressed by respondents are considered waived or conceded). Despite the lack of a defense rebuttal, the panel effectively acted as advocate for the defense by denying the motions without reasons.

Over the last three decades the U. S. Supreme Court has properly shown itself very solicitous of white petitioners who claimed that their superior qualifications have been overlooked in favor of lesser qualified black competitors. The case at bar is clearly one in which an unqualified white candidate Lynda Hatch was not only

tenured but elevated to a Distinguished Chair while a black candidate with superior qualifications was denied tenure and dismissed.

Courts have held that statistical patterns can have probative value. This petitioner respectfully asks the court to turn a statistical mirror on the judiciary and see what it reveals about equal protection for black Title VII litigants. In their book, *'Academics in Court' (University of Michigan Press, 1990)*, the authors paint the following troubling picture based on their analysis of Title VII case outcomes:

> 'The other successful category is white females who have sued black institutions. They have won 4 out of 4. Indeed the only environment in which plaintiffs have generally been successful is when whites sue black institutions. In these cases plaintiffs, both male and female have won 8 out of 12 times. On the other hand, when blacks (11) or other minorities (12) have sued white institutions, they have almost always lost. That is certainly not an outcome anyone would have predicted when the congressional amendments were passed in 1972' p. 34

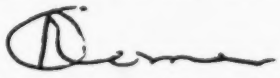
The State of Washington has outlawed affirmative action on the pretext that qualified white candidates experience reverse discrimination that favors unqualified minorities. This case shows that the State of Washington has outlawed affirmative action and replaced it with a perverse pro-white and anti-black affirmative action where the state fraudulently inflates the qualification of white candidate Lynda Hatch in order to justify her appointment to an undeserved distinguished chair. At the same time the State uses blatant untruths and distortions to diminish the accomplishments of a qualified black candidate who is denied tenure. The court need only read the expert testimony of Dr. Dale Baker in order to see the blatant discrimination perpetrated by the State of Washington in this case. Dr. Baker's testimony had been properly validated by the court

and unlike Steve Olswang she has the appropriate credentials and did not lie to the jury.

Federal Rule of Evidence 103(d) provides that *"[n]othing in this rule [requiring an objection] precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."* It is not an inconsequential matter when the Attorney General and senior academic administrators of a powerful state compromise the integrity of a jury trial by knowingly and repeatedly lying to the court about material issues and level false accusations against individuals who do not have the resources to defend themselves. They should be held accountable for their multiple falsehoods and be criminally prosecuted for their perjury. Defendants' demonstrated use of falsehoods and misrepresentation in court gives credence to petitioner's contention that WSU administrators used the same tactics to vilify petitioner among his departmental peers so that the department's endorsement for petitioner went from unanimous (100%) in the first and third year reviews to only 54% in the sixth year tenure review, despite petitioner's improvement in all areas following the third year review.

CONCLUSION:

For all the foregoing reasons, Petitioner's respectful prayer to this Honorable Court is to grant the Petition. For lying in court defendants should at the least be made to forfeit their award of costs. Respectfully Submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.02-35377

D.C. No. CV-00-05774-FDB

OBED NORMAN,
Plaintiff- Appellant,
v.
STATE OF WASHINGTON;
WASHINGTON STATE UNIVERSITY
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

MEMORANDUM*
March 21, 2003 Filed

Submitted March 10,2003**

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
**This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: CANBY, O'SCANNLAIN, and T.G. NELSON, Circuit Judges

Obed Norman appeals pro se the jury verdict for defendant in his action alleging Washington State University denied him tenure based on his race and in retaliation for filing a charge with the Equal Employment Opportunity Commission. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because Norman did not file a Fed. R. Civ. P. 50(b) motion for judgment as a matter of law, we review the jury's verdict for plain error. *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir. 2002). We review for an abuse of discretion the district court's evidentiary rulings. *Defenders of Wildlife*, 204 F.3d 920,927 (9th Cir.2000). We affirm.

Because we cannot say that there is "an absolute absence of evidence to support the jury's verdict," the district court did not commit plain error in entering judgment for defendants. *See Image Technical Servs. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997) (citations ommitted).

Norman contends he was prejudiced because the district court allowed evidence of a sexual harassment investigation against Norman. This contention lacks merit because Norman himself referred to this evidence during his opening statement. *See Defenders of Wildlife v. Bernal*, 204 F .3d at 928 (must show prejudice to warrant reversal based on evidentiary rulings).

Norman also contends he should have been allowed to submit unspecified evidence of discrimination against other minority faculty. This contention fails because Norman did not demonstrate he was prejudiced when the district court
disallowed this evidence. *See id.*

Norman's contention that the district court erred by not giving a clear punitive damages instruction to the jury lacks merit because the jury found no liability, and therefore

never reached the issue of damages. *Cf. Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493,514 (9th Cir. 2000) (stating that punitive damages may be awarded only if plaintiff shows defendant violated federal right). Because Norman never offered a jury instruction on "after acquired evidence," or alleged a breach of contract claim, he has waived the right to raise these issues on appeal. See Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1110-11 (9th Cir. 2001).

Norman's contention that defense counsel and witnesses engaged in misconduct lacks merit. The misconduct he alleged, including vague allegations that defense counsel lied during opening and closing statements, did not permeate the entire proceeding. *See Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 107 (9th Cir.991) (holding that reversal for misconduct is rare and only granted when misconduct permeates entire proceeding such that jury is "necessarily influenced by passion and prejudice in reaching its verdict"); *see also Three Boys* music Corp. v. Bolton, 212 F. 3d 477, 482 (9th Cir. 2000) (holding that the credibility of witness is an issue for the jury and generally not subject to appellate review).

Norman's September 9, 2002 request for judicial notice of an amicus-curiae brief is granted. Norman's request that this court take judicial notice of perjury committed at trial is denied. Norman's November 8, 2002 motion to remand to the lower court is denied. Norman's December 2, 2002 motion requesting release from judgment and to supplement the record is denied.

Norman's remaining contentions lack merit.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.02-35377

D.C. No. CV-00-05774-FDB
Western Washington
(Tacoma)

OBED NORMAN,
Plaintiff- Appellant,

v.

STATE OF WASHINGTON;
WASHINGTON STATE UNIVERSITY
Defendants-Appellees.

ORDER

August 14, 2003 Filed

/

Before: CANBY, O'SCANNLAIN, and T.G. NELSON, Circuit Judges.

Appellant's motion for reconsideration, clarification and release from judgment on account of defense fraud is denied.

Appellant's motion for judicial notice of appellee and witness perjury is also denied.

Appellant's request for publication is denied. The clerk shall file the request received on May 20, 2003.

The panel has voted to deny appellant's petition for panel rehearing. Judges O'Scannlain and Nelson vote to deny the petition for rehearing en banc and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See Fed.* R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.

Appellant's request for stay of the mandate filed on March 13,2003 is denied.

No further filings shall be accepted in this closed appeal.

APPENDIX C

August 21,2001
Mr. Kevin Keaney, Esq.
825 Northeast Multnomah Street
Suite 960
Portland, OR 97232

Dear Mr. Keaney,

The practice of sending credentials to an outside evaluator at another university is standard practice when an individual comes up for tenure or promotion to full professor.
The evaluator is a senior academician who commonly receives the vita and sometimes examples of scholarship to read. The evaluator renders an opinion based on these materials and writes a letter that then becomes part of the tenure and promotion materials.

I have examined the vita of Drs. Norman, Slavit, and Hatch for comparability of quality. Under an academic review three lines of evidence are examined. They are scholarship, teaching and service. In the case of the three vitae provided for my evaluation, evidence of teaching was missing. Therefore, I can only make judgments concerning scholarship and service.

When making judgments about scholarship, the quality and quantity must be taken into consideration. The ranking of the journal and whether the journal is refereed (articles are blind reviewed by experts) are important. Top ranking refereed journals have a higher rejection rate and are more difficult to publish in than lesser-ranked and non-

refereed journals. Publishing in top ranked refereed journals indicates a high level of scholarship including a superior grasp of the research, an important research question, results and conclusions that have an impact on the field, and the ability to write and communicate clearly.

A similar judgment is made about paper presentations. Prestigious conferences use a blind review process for papers and a high rejection rate. Acceptance at prestigious conferences indicates that the paper reflects superior scholarship with something important to say to the academic community. Proceedings are a collation of all the papers presented at a small conference that are then available for individual who were unable to attend the conference or attended the conference or a particular paper reading. Grants also differ in prestige and difficulty of attainment. Large awards from the National Science Foundation are the most difficult grants to obtain, while local and state grants, or those awarded by the university (known as internal grants) are the easiest to obtain. Private foundation grants vary in difficulty of attainment.

Grant proposals to federal agencies such as the National Science Foundation the Environmental Protection Agency or, the National Institute of Health undergo multi-tiered blind reviews by a panel of expert scholars. States, foundations and universities vary in the way they review and select proposals. Most states, foundations and universities have a less rigorous review process. Thus, grants from these entities are relatively easy to obtain.

Service is judged by the amount given at the university, community and national level. An untenured professor is expected to provide a moderate amount of service at all three levels but service is the least important area of professional activity. Service is typically, reviewing,

serving on committees, administration, or workshops and talks to
the public.

I have used the criteria of quality and quantity of publishing, paper presentations, grant attainment, and service in the evaluation of the work of Drs. Norman, Slavit and Hatch and have concluded the following. The credentials ofDr. Norman and Dr. Slavit are essentially the same. The credentials of Dr. Hatch are significantly poorer than those of Dr. Norman and Dr. Slavit. I will outline my reasons for these conclusions in the paragraphs below. I have also provided a table.

Dr. Norman has three articles in refereed journals ranked in the top ten in education for number of citations and rejection rate. The other three are either in unranked or regional journals. He has given 11 national and international paper presentations at prestigious conferences and two at local conferences. He also has work in 3 sets of conference proceedings. The proceedings duplicate the papers given at smaller conferences. These articles, papers, and proceedings are high quality scholarship.

Dr. Norman has obtained approximately $3,677,000 in grants. Three million of this amount is from the National Science Foundation in the form of three grants. The remaining 4 grants are from state sources. The majority of his grant support comes from one of the most prestigious funding agencies with the most rigorous review process. These awards attest to the quality of the grant proposal, importance of the proposed work, and clarity of ideas. Three very large NSF awards is a significant accomplishment that many more seasoned academics have not been able to achieve.

Dr. Norman has rendered moderate service at both the national and university level. This service consists of committee work and reviewing.

Dr. Slavit has seven articles in refereed journals but none of them are ranked among the top ten. He has an additional three articles in regional journals. He has given 17 national and international paper presentations at prestigious conferences and 8 at local conferences. He also has work in 7 sets of conference proceedings that duplicate paper presentations. He has one chapter in a book being published by a well-known academic press. These articles, papers, book chapter, and proceedings are high quality scholarship.

Dr. Slavit has obtained approximately $151,350 in grants for eight funded proposals. The National Science F oundation awarded $119,141 of this total in the form of one award. The remaining 7 grants were awarded by the State of Washington (2) and Washington State University (5). The NSF grant was the most difficult to obtain and is commendable, but it is a small in comparison with the dollar amounts of most NSF awards. The state and university awards were relatively easy to obtain. Dr. Slavit provided no evidence of service.

Dr. Hatch has 7 articles in non-refereed journals. These journals are unranked, poor quality, or not targeted at an academic audience. Articles in magazines, newsletters, and edu-grams were not counted because they did not qualify as academic journals. Dr. Hatch has given 1 paper at a conference not generally recognized as educationally prestigious. Nor, did this conference publish proceedings. She has writtenlO books that fall under the genre of "how to" rather than research and scholarship, e.g. one comes with posters. These books do not contribute to the body of

educational research. The quality of Dr. Hatch's scholarship is very poor.

Dr. Hatch has obtained approximately $1,349,346 in 21 grant awards. One award is from the National Science Foundation ($594,796) and one from the Environmental Protection Agency ($5,000). Nine grants are from Northern Arizona University or a state agency; three of which are for travel. The remaining grants are from private Foundations. Most of the foundation, university, and state grants are in the $100,00 to $500 range. The NSF award was the most difficult to obtain and is commendable, but it is a small in comparison with the dollar amounts of most NSF' awards. The remaining grants were less difficult to obtain especially those with low dollar amounts.

Dr. Hatch has a great deal of service. She has served as an administrator, does extensive reviewing and conducts many workshops for teachers, especially at the National Science Teachers Association.

In summary, Dr. Norman has fewer articles than Dr .Slavit and the same number as Dr. Hatch but the quality of the journals he has published in is higher. He has fewer paper presentations and proceedings than Dr. Slavit and more than Dr. Hatch. The status of the conferences at which Dr. Norman and Dr. Slavit have presented papers is comparable. Dr. Hatch has only one academic paper presentation at a lesser-ranked conference. Dr. Norman has no, books or book chapters while Dr. Slavit has one chapter. The 10 books written by Dr. Hatch do not meet the standards for academic writing.

Dr. Norman is clearly the most successful of the three in obtaining grants under highly competitive conditions. He has spent a great deal of time successfully obtaining over a million and a half in grant money. The time needed to

conceive of and write successful competitive grants is comparable to that needed to conduct research and write articles for refereed journals. Consequently, the dollar amounts and difficulty of attainment of Dr. Norman's NSF grants offsets the lesser number of published articles and book chapters. Thus, I conclude that the vitae of Dr. Norman and Dr. Slavit are different yet comparable.

Dr. Hatch's credentials are notable for the quantity, e.g. 10 books, 21 grants, but her writing does not meet the academic standards for quality and scholarship. Nor, does the quantity of grants amount to more than approximately a third of what has been obtained by Dr. Norman. Thus, I conclude that Dr. Hatch's credentials are of lesser quality and merit than those of Dr. Norman and Dr. Slavit.

Sincerely,

s/ Dr. Dale R. Baker
Professor, Science Education
15814 S. 13th Place
Phoenix, AZ 85048

APPENDIX D

REGULATORY APPENDIX

(a) Federal Rules of Evidence 201: Taking Judicial Notice

(a) Scope of rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) **capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(f) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

Notes of Advisory Committee on Rules.

Subdivision (a).

This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of "adjudicative" facts.

[T]he regulation of judicial notice of facts by the present rule extends only to adjudicative facts.

What, then, are "adjudicative" facts? Davis (A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73 (1964)), refers to them as those "which relate to the parties," or more fully:

"When a court or an agency finds facts concerning the immediate parties--**who did what, where, when, how, and with what motive or intent**--the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . . "

Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. **They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses**." 2 Administrative Law Treatise 353.

Subdivision (b).

Compare Professor Davis' conclusion that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. Id., 94.

This rule is consistent with Uniform Rule 9(1) and (2) which limit judicial notice of facts to those ..."so universally known that they cannot reasonably be the subject of dispute," those "so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," **and those "capable of**

immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."

The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such.

Subdivision (f).

In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.

Committee Notes on Federal rules of Evidence 301:

If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact.

(b) Federal Rules of Evidence 702:
Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods,

and (3) the witness has applied the principles and methods reliably to the facts of the case.

© Federal Rules of Evidence 703:

Bases for Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. **Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.**

(d) Federal Rules of Evidence 704:

Opinion on Ultimate Issue.

(a) Except as provided in subdivision (b), **testimony in the form of an opinion or inference otherwise admissible is not objectionable** because it embraces an ultimate issue to be decided by the trier of fact.

(e) Federal Rules of Evidence 403:
Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, **or misleading the jury**, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(f) Federal Rules of Civil Procedures Evidence 26 (2) (B):

Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving **expert testimony, be accompanied by a written report prepared and signed by the witness**. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(g) Federal Rules of Civil Procedures Evidence 26 (2) (C):

These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other

directions from the court or stipulation by the parties, **the disclosures shall be made at least 90 days before the trial date** or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(h) Federal Rules of Civil Procedures Evidence 26 (a)(4)(A) Trial Preparation: Experts.

A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), **the deposition shall not be conducted until after the report is provided.**

APPENDIX E

Title: Animal care, day by day
Personal Author: Hatch, Lynda
Journal Name: Science and Children
Source: Science and Children v. 32 (September 1994) p.30-3
Publication Year: 1994
Physical Description: Illustration
ISSN: 0036-8184
Language of Document: English
Subjects: Pets/Care
Document Type: Feature
Accession Number: 199424400748004

Title: Collaborative inquiry in science, math, and technology (Book Review)
Personal Author: Hatch, Lynda, reviewer; Adams Dennis M., book author
Journal Name: Teaching Children Mathematics
Source: Teaching Children Mathematics v. 5 no. 7 (March 1999) p. 444
Publication Year: 1999
ISSN: 1073-5836
Book Reviewed: Title: Collaborative inquiry in science, math, and technology. Adams, Dennis M.
Document Type: Book Review
Accession Number: 199906000445015

Wed Oct 29 18:39:15 2003
Cambridge Scientific Abstracts
Database: ERIC
Query: AU=(Hatch AND Lynda)
Your Comments:

Record 1 of 3

DN: Database Name
ERIC
TI: Title
United States of America Elementary Science Education--A
Historical Perspective Leading to Current Practices.
AU: Author
Hatch, Lynda
SO: Source
Science Education International; v11 n2 p6-7 Jun 2000
NU: Other Numbers
Clearinghouse: SE566164
AB: Abstract
Presents an historical perspective of science education in the United States to explain current teaching and curriculum approaches. (YDS)
LA: Language
English
PY: Publication Year
2000
PT: Publication Type
052 Guides: Classroom: Teacher; 080 Journal Articles
DE: Descriptors

Educational Change; Elementary Secondary Education; *Science Curriculum; *Science Education History; *Science Instruction; *Teaching Methods
SF: Subfile
ERIC, Current Index to Journals in Education (CIJE)
AN: Accession Number
EJ638133

Record 2 of 3
DN: Database Name
ERIC
TI: Title
Learning about World Cultures through Folktales.
AU: Author
Fuhler, Carol J ; Farris, Pamela J ; Hatch, Lynda
SO: Source
Social Studies and the Young Learner; v11 n1 p23-25 Sep-Oct 1998
IS: ISSN
1056-0300
NU: Other Numbers
Clearinghouse: SO532699
AB: Abstract
Explores folktales from China, Africa, and Russia suggesting ways to utilize them in the social studies classroom as a means to teaching children about other cultures. Warns that when using folktales it is important to explain that the folktales do not bear a one-to-one relationship with present-day societies. (CMK)
LA: Language
English
PY: Publication Year
1998

PT: Publication Type
080 Journal Articles; 141 Reports: Descriptive
DE: Descriptors
*African Culture; *Chinese Culture; *Cultural Awareness; *Educational Strategies; Elementary Education; Foreign Countries; Geography; *Interdisciplinary Approach; Language Arts; *Social Studies; Social Values
ID: Identifiers
Africa; China; *Folktales; Russia
SF: Subfile
ERIC, Current Index to Journals in Education (CIJE)
AN: Accession Number
EJ612134

Record 3 of 3
DN: Database Name
ERIC
TI: Title
Building Spelling Confidence
AU: Author
Dunkeld, Colin; Hatch, Lynda
SO: Source
Elementary English; 52; 2; 225-9,247; Feb 1975
NU: Other Numbers
Clearinghouse: CS706683
AB: Abstract
Classroom spelling programs should grow out of the children's individual needs and include various writing opportunities. (JH)
PY: Publication Year
Feb 1975
DE: Descriptors
Arts;

APPENDIX F

NATIONAL SCIENCE FOUNDATION

The Faculty Early Career Development (CAREER) Program is a Foundation-wide activity that offers the National Science Foundation's most prestigious awards for new faculty members. **The CAREER program recognizes and supports the early career-development activities of those teacher-scholars who are most likely to become the academic leaders of the 21st century**. CAREER awardees will be selected on the basis of creative, career-development plans that effectively integrate research and education within the context of the mission of their institution. NSF encourages submission of CAREER proposals from new faculty at all CAREER eligible institutions. Such plans should build a firm foundation for a lifetime of integrated contributions to research and education

APPENDIX G

CONDITIONS FOR TEMPORARY EMPLOYMENT

Campus Student and Hourly
Employment Office
Washington State University
French Administration Building 12
Pullman, WA 99164-1012
Telephone 335-1969

TO BE COMPLETED BY EMPLOYING DEPARTMENT

Enter all Information — Current Appointment

Employee name: Bonnie L. Bentz	Social Security Number: 544-78-2781	Title: Professional Worker I	
Department WSU Education	Position Number 855914	Begin Date 10/1/1999	End Date 6/30/2000
Supervisor Obed Norman	Work Days Mon-Fri	Hours of Work 8am – 5pm	Pay Rate $8.00 / hr

Employee Signature: s/Bonnie L. Bentz

TO BE COMPLETED BY THE EMPLOYING OFFICIAL

Supervisor's Signature — Date
s/ O. Norman — 10/21/1999
Hiring Official Signature — Date
s/ H. A. Dengerink

APPENDIX H

COLUMBIA TRAVEL
1111 Main Street, Suite 100
Vancouver, WA, 98660
Phone (360) 695-2929
Fax (360) 695-2533

SALES PERSON: 39
DATE: 01 OCT 99
ITERNARY/INVOICE NO.: 0019240 UEYVL
PAGE: 01

TO: WASHINGTON STATE UNIVERSITY
ACCOUNTS PAYABLE DEPT.
14204 SALMON CREEK AVE.
VANCOUVER WA 98686

FOR: NORMAN/OBED
BENTZ/BONNIE

06 OCT 99 – WEDNESDAY
AIR UNITED AIRLINES FLT: 2275 ECONOMY
LV PORTLAND OR 915P EQP:BOEING 737 300
01HR 37MIN
AR SAN FRANSISCO 1025P REF: RD70JW
ARRIVE: NORTH TERMINAL
SEAT ASSIGNMENT AIRPORT CHECKIN

APPENDIX I

Date: Wed, 19 Jan 2000 13:38:02 – 0800
To: Obed Norman <norman@vancouver .wsu .edu>
From: Hal Dengerink <dengerin@vancouver.wsu.edu>
Subject: Re: Mike Spannik' salary
Cc: ernst@vancouver@wsu.edu (Ernst-Slavit, Giesla),
hooverp@vancouver@wsu.edu (Hoover, Patricia)

I do not doubt you assessment of his performance. But please keep in mind that the university, not the individual investigator, determines what a probationary period is. And the university also sets the rules for when and how salary increases may be awarded. I cannot authorize any changes outside of the university rules. If you want to do this please work with Jeane Greene and Pat Hoover to do so within the university guidelines.

At 01:09 PM 1!19/00 -0800, you wrote:

>mike spannik has worked on my project since about october >99 and has done good work in the last three months which i >considered a probationary period. mike has excellent >technical and organizational skills which have proved >very valuable to the various phases of this research project. >as his supervisory it is my judgment that he deserves to be >appointed at a higher level with the level and rate spelt out in >my recent email to pat hoover.

>thank you. obed norman

»Obed: Before you begin the paperwork to appoint Mike »Spannik to a higher level in order to pay him at a higher rate »than $9.83/hr, Hal has requested that. you send him a request »with a justification for the higher rate. Thanks.

»**********

»Pat Hoover

»Finance/Budget Coordinator, WSU Vancouver

APPENDIX J

TENURE/PROMOTION RECOMMENDATION
NAME: Obed Norman
FINAL ACTION:

	FACULTY	CHAIR	DEAN
PROVOST			
GRANT TENURE	7	1	
DENY TENURE	7		X
PROMOTE	7	1	
DEFER PROMOTION			

SOCIAL SECURITY # 197-60-3457

CURRENT TITLE : Assistant Professor

DEPARTMENT/UNIT: Teaching and Learning – 2132

LOCATION: PULLMAN, SPOKANE, TRI-CITIES, **VANCOUVER**, OTHER

TERMINAL DEGREE: Ph. D. DEGREE YEAR: 1992
BEGINNING TENURE-TRACK YR @ WSU: 1994

ACADEMIC: XX ANNUAL :

TENURED YEAR: TENURE ELIGIBLE YEAR: 2000
YEAR OF THIRD-YEAR REVIEW: 1996-
SUPPORT MATERIAL ATTACHED:
√ CURRENT RESUME

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

No. 03-1062

Supreme Court, U.S.
FILED
MAR 31 2004
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OBED NORMAN,

Petitioner PRO SE,

TO BE RECOVERED

STATE OF WASHINGTON and
WASHINGTON STATE UNIVERSITY,

Respondents.

ON PETITION FOR WRIT OF MANDATE TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR RECONSIDERATION

OBED NORMAN
PETITIONER PRO SE
350 E. TAYLOR ROAD
#2218
SAN JOSE, CA 95112
(408) 9243650

CERTIFICATE OF RULE 44 COMPLIANCE BY PRO SE PETITIONER

Petitioner Obed Norman solemnly declares that this petition for reconsideration of Petition 03-1062 is presented in good faith and not for delay.
This petition for rehearing is restricted to substantial grounds, affidavits, and legal arguments not previously presented. The petition is restricted to the grounds specified in Rule 44.

s/ Obed Norman:
Petitioner Pro Se. Dated this 1st day of April, 2004
350 E. Taylor Street #2218
San Jose CA 95112
Tel: 408-9243650

TABLE OF CONTENS

Introduction.....1
Appendix 1a

INTRODUCTION

This petition for reconsideration complies with the requirements of Supreme Court Rule 44.2 on account of the following:

a. The reconsideration brings to the attention of the Court additional examples of unvalidated and untrue statements presented to the jury by the defense expert Steve Olswang.

b. The reconsideration brings to the attention of the Court the context of the case that will assist the Court to consider the situation in its entirety.

c. The reconsideration also presents to the Court sworn affidavits on relevant matters by the following individuals:

i. Dr. Etta Hollins, Former Administrator at Washington Sate University and now Professor of Teacher Education, University of Southern California.

ii. Dr. William Kyle, Desmond Lee Family Professor of Science Education, University of Missouri, St. Louis. Former Editor of the leading journal in Science Education (The Journal of Research in Science Teaching).

iii. Dr. Alberto Rodriguez, Associate Professor of Science Education, San Diego State University.

iv. Earl W. Ford, President of the Vancouver Branch of the National Association for the Advancement of Colored People (NAACP).

v.Paul Kappilla, Academic ReferenceLibrarian and Instructor, Dr. Martin Luther King Library, San Jose, CA.

d. The Court's order denying Petition 03-1062 was filed on March 8, 2004 and this petition for reconsideration was filed timely before or on April 1, 2004.

ADDITIONAL FALSEHOODS BY DEFENSE EXPERT STEVE OLSWANG

The reconsideration brings to the attention of the Court additional examples of unvalidated and untrue statements presented to the jury by the defense expert Steve Olswang and presented to the court for the first time in this petition for reconsideration. These untrue statements constitute a matter of law (Fed. R. of Ev. 702 and Fed. R. of Civ. Proc. 26) and are relevant to the questions presented for review as they are the statements made under oath by an expert whose statements were not validated by the trial court as required under the discovery rules and *Daubert*. **These additional examples demonstrate that defendants' entire defense was based on falsehoods and material misrepresentations.** A miscarriage of justice will be avoided if the case is remanded to the courts below for Daubert briefing so that the jury will have the opportunity to hear validated and truthful expert testimony. Under oath Olswang made the following false statements on material and substantive issues:

1. 'They [Petitioner Norman's publications] were not cross-cited' (Trial Transcript at 356). Olswang argued in court that Petitioner's scholarship showed no thematic coherence as petitioner's publications were not cross-cited. The documents Olswang reviewed

BEST AVAILABLE COPY

show a cross-citation. Olswang's expert opinion on a pivotal point of the respondents' case is based on a falsehood. Respondents had stated in their official documents that the main reason for the tenure denial was the lack of coherence in petitioner's scholarship.

2. 'She [White comparator Hatch] had …an international reputation. Quite a few of her materials had been published in England' (Trial Transcript at 375). Nothing by Hatch had been published in England. Olswang's factual basis for his opinion regarding Hatch's 'international reputation' is false.

3. 'She [Hatch] had eight articles in '96, 97, and six more, including curriculum guides in '96' (Trial Transcript at 374). This statement is contradicted in its entirety by the record of Hatch's publication record (see Affidavit by academics in appendix).

4. Olswang stated falsely under oath that external reviewer Dr. Atwater was 'dependent for her summer salary' on petitioner's NSF grant. Dr. Atwater had never been paid anything from the NSF grant at any time. Olswang made this false statement to undercut Dr. Atwater's external review in support of petitioner's tenure application.

These falsehoods are additional to the ones already brought to the court's attention in Petition 03-1062. All these falsehoods were brought to the attention of the trial court and were all addressed in Petitioner's Fed. R. of Ev. 201 Motion of Mandatory Judicial Notice to the 9th Circuit. Defendants surprised with these falsehoods on the stand by failing to

comply with Fed. R. of Civ. Proc. 26 and with the specific discovery orders of the court.

THE CONTEXT OF THE CASE

Additionally Petitioner respectfully requests the Court to reconsider the denial of Petition 03-1062 in the light of the particular context of this case. This case is about the reputation of the courts to equitably afford the protection of the law to all. The defendants in this case have not disputed that they as well as their counsel and expert witness have lied repeatedly under oath on material and substantive points. Petitioner has invoked the myriad federal rules (see Petition 03-1062) that mandate the court to protect litigants from the lies of opposing parties. Fed. R. Civ. P. 60 allows for litigants to be held accountable for fraud and lying to the jury up to one year after the trial. Fed. R. Civ. P. 26 guarantees the due process of subjecting expert testimony to timely discovery and validation. By declining the petition the court is withholding the protection of the law from petitioner.

Petitioner respectfully points out to the court the need to protect the integrity of the judicial system. This same need has been expressed by the authors of 'Academics in Court' (University of Michigan Press, 1990. Cited in Petition 03-1062). These authors quote the following comments by one of the many individuals from whom they gathered information for their comprehensive treatise on Title VII case outcomes:.

> 'I have represented a number of academics in discrimination cases with a lack of success totally disproportionate to all other areas of my practice. It is my opinion that the unwillingness of the courts to "call a spade a spade" is extremely detrimental to the plaintiffs, to the integrity of the institutions sued and to

> our society at large. It is never pleasant to lose a lawsuit but that is quite different from the sense of outrage I have felt, and I know my clients have experienced in this area. It appears that the judiciary has made a pact with institutions of higher education to pay lip service to the law.' p. 238.

How will the respondents in this case not conclude that the court has in effect given them a license to lie? When it was discovered that journalists Jason Blair and of the New York Times and Jack Kelly of USA Today had lied they were dismissed. In contrast the respondents in this case are being rewarded by the court for lying under oath. It is crucial that courts maintain a reputation for insisting on the truthfulness of sworn testimony. By denying Petition 03-1062 for a Writ of Mandate the court is showing a disturbing tolerance for untruthfulness by litigants. Our country has suffered immensely in recent times because of the untruthfulness of certain corporate leaders. Neither the reputation of our judiciary nor our nation will be well served at this time when litigants are rewarded for lying under oath.

This case is about more than ten discrete instances of lying by respondents. These are the same respondents whose counsel told the jury in closing:

> 'Now, I told you in the opening of this case, my opening statement, that this case was about truthfulness. I submit to you that four days later the case is still about truthfulness. Nothing has changed, okay.' p.64 Trial Transcript.

After lying to the jury repeatedly, the respondents cynically stated in opening and closing that their theory of the case was that it was about truthfulness. Respondents prevailed at trial and as a matter of law their theory of the case prevailed.

This case is about truthfulness as a matter of law and for that reason the demonstrated falsehoods of the respondents must result in reversal or at least remand of the case.

The profile of respondent Washington State University is one more reason why the court should reconsider the denial. Before 1999 the College of Education and the Vancouver Branch campus had 9 black tenured or tenure track faculty. By 2001 every single black faculty had either left or been dismissed.. Dr. Etta Hollins left in 1998 after receiving two death threats in her in her WSU office. This incidence was reported to the FBI by Dr. Hollins. In 1999 a young black faculty member Dr. Collin Beckels committed suicide after WSU falsely accused him of raping a white student. As was pointed out in Petition 03-1062 WSU had similarly coerced student Bonnie Bentz-Hewlett to sign a false affidavit claiming Petitioner had harassed her sexually. The email correspondence presented to the court totally disproves this false charge by WSU and the white student.

WSU will construe a denial of Petition 03-1062 as providing a judicial imprimatur for their institutional practice of creating a hostile and dangerous working environment for black faculty by lying about them. Petitioner respectfully requests the court to reconsider its denial in the light of the pervasive falsehoods perpetrated by WSU and the impact of this conduct on many individuals.

Petitioner also requests the court to be mindful of the court's reputation as dispenser of equal protection. The 9th Circuit vacated black plaintiff Mukhtar's (cited in Petition 03-1062) jury victory because the trial court had not used the word 'reliability' in ruling on the Daubert briefs. In Mukhtar all parties had complied with the discovery orders and rendered truthful testimony. In the case at bar the respondents

had not only breached the discovery orders but their expert presented a case based entirely on demonstrated falsehoods. In fact the sworn expert testimony of Steve Olswang does not contain one single true statements on a substantive and material issue. The 9th Circuit insisted that the appellants were entitled to validated expert testimony. Petitioner respectfully asks that the due process right to validated expert testimony also be extended to him.

The court recently ordered the University of Michigan to stop awarding points for minority applicants to that University's undergraduate programs. With its point system the University of Michigan was attempting to address the historical exclusion of minorities from higher education. In the case at bar the court is being asked to stop Washington State University from fraudulently inflating the credentials of white faculty members and also to stop diminishing the credentials of black faculty members.

When the court ruled against the University of Michigan many black students interpreted that ruling as creating a less welcoming environment at Michigan and black enrollment declined significantly. The denial of Petition 03-1062 in effect upholds Washington State's University's practice to fraudulently inflate the qualifications of white faculty as they have done with Lynda Hatch and David Slavit in this case. Given the response to the Michigan ruling, there is a real danger that the denial of Petition 03-1062 may be seen as the US Supreme Court's 21st Century resurrection of the Dred Scott Principle: 'Black litigants and black employees may have rights but white institutions and the courts need not honor those rights'.

For the reasons set forth above Petitioner respectfully requests reconsideration of the denial of Petition 03-1062.
The court should extend the protection of the law to petitioner by reversing the verdict or vacating. Respondents should not be awarded $5,000 cost for lying over 15 times to a lay jury. That in itself is a gross miscarriage and travesty of justice.

Respectfully Submitted,

s/Obed Norman:
Petitioner Pro Se. Dated this 1st day of April 2004
350 E.Taylor Street #2218 San Jose, CA 95112

APPENDIX

JOINT SWORN DECLARATION BY PROFESSORS ETTA HOLLINS, WILLIAM KYLE, ALBERTO RODRIGUEZ, AND VANCOUVER NAACP PRESIDENT EARL FORD.

We, the above named individuals jointly and severally declare under penalty of perjury of the laws of the state of Washington and the United States that the following is true and accurate:

1. We are all over age 18, and competent to testify, and make this declaration of our own personal knowledge and/or review of records as set forth herein.

2. We have reviewed the expert testimony of Dr. Steve Olswang in C02-5494 FDB, the vita of Dr. Lynda Hatch, as well as the public record of Dr. Hatch's academic publications compiled by a professional librarian Paul Kappuila, Academic Reference Librarian and Instructor, Dr. Martin Luther King Library, San Jose, CA.

3. From our review of the named records and Petition 03-1062 we state the following true facts:

3.1 Dr. Lynda Hatch, appointed by WSU as Boeing Distinguished Professor of Science Education has published 5 articles in unranked journals consisting of 15 pages total.

3.2 Dr. Olswong's sworn testimony that Dr. Hatch had published 'eight articles in 96, 97' is false.

3.3 Dr. Olswong's sworn testimony that Dr. Hatch had published six articles in 2002 and a couple books in 99' is

false.

3.3 Dr. Olswong's sworn testimony that 'They [Petitioner Norman's publications] were not cross-cited' is false. Dr. Olswang's factual basis for his opinion regarding the thematic unity of Dr. Norman's scholarship is false.

3.4 Dr. Olswong testified under oath: 'She [White comparator Hatch] had …an international reputation. Quite a few of her materials had been published in England'. This statement is false. The public record does not show any publication by Dr. Hatch in England. Dr. Olswang's factual basis for his opinion regarding Dr. Hatch's 'international reputation' is false. Those of us who are active scholars in Education (Kyle, Rodriquez, and Hollins) had never heard of Dr. Hatch or her work until our involvement in this case.

3.5 Dr. Olswong testified under oath: 'In the grant area, he[Norman] had a number of grants, two primary ones, one which was a career development award, which is something that the National Science Foundation particularly gives in the field of science, particularly to minority faculty'. This statement by Dr. Olswang is a factual mischaracterization of the $500,000 research grant awarded to Dr. Norman by the National Science Foundation (NSF). The NSF describes this grant as the 'most prestigious award' awarded to 'those teacher-scholars … most likely to become the academic leaders of the 21st century.'

4. It is not accepted practice for senior academics to give false testimony while under oath in court.

5. It is not accepted practice for academic institutions to award distinguished chairs on the basis of non-existent credentials.

s/ Professor ETTA HOLLINS,

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Dated this 1st day of April 2004.